DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER 99-0410

RESPONSIBLE OFFICER

SALES TAX AND WITHHOLDING TAX

For Tax Periods: February, 1989-1993

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ISSUES

1. Responsible Officer Liability – Duty to Remit SalesTaxes

Authority: IC 6-2.5-9-3; Indiana Department of Revenue v. Safayan 654 N.E.2nd 270 (Ind.1995).

Taxpayer disputes the determination that he had a duty to remit the corporation's sales taxes.

2. Responsible Officer Liability – Duty to Remit Withholding Taxes

Authority: IC 6-3-4-8(f).

Taxpayer disputes the determination that he had a duty to remit the corporation's withholding taxes.

Statement of Facts

The Indiana Department of Revenue timely assessed the corporation liabilities for withholding taxes and sales taxes unpaid to the state for the tax period 1989-1993. The corporation did not remit these taxes and the Indiana Department of Revenue assessed the liabilities against Taxpayer as a responsible officer of the corporation. Taxpayer protested this assessment. More facts will be provided as necessary.

1. Responsible Officer Liability – Duty to Remit Sales Taxes

Discussion

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 which provides as follows:

> An individual who:
>
> (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
>
> (2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." This business was a family business. The two major shareholders of the corporation were the sons of the founder of the business. Two minor shareholders were cousins of Taxpayer. The two major shareholders were officers of the corporation. One of the minor shareholders was the corporate secretary. The corporate secretary signed the "Amended S Corporation Return" for the calendar year ending December 31, 1991. The secretary also discussed an Indiana Department of Revenue audit with a state auditor and signed the audit summary as the corporate representative on March 30, 1992. This officer also handled daily financial matters of the corporation. Taxpayer was merely an employee of the corporation until late in the corporation's life. During most of his employment, Taxpayer was not involved in the financial matters of the corporation. These facts indicate that Taxpayer was not the person with the duty to remit trust taxes prior to August 10, 1992.

After the secretary left the corporation in 1992, Taxpayer became more involved in the corporation's day to day operations. Taxpayer was added as a signatory on the bank signature card on August 10, 1992. After that date, Taxpayer became an employee with the authority to decide which bills would be paid and signed corporate checks. Taxpayer was a responsible officer after August 10, 1992.

Finding

Taxpayer's protest to the sales taxes for periods prior to August 10, 1992 is sustained. Taxpayer's protest to the sales taxes for the period after August 10, 1992 is denied.

1. Responsible Officer Liability – Duty to Remit Withholding Taxes

Discussion

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest." The issue to be determined is whether or not

Taxpayer was under a duty to deduct and remit the corporate withholding taxes to the state.

The withholding taxes are for the tax period ending December 1989. That was before Taxpayer had day to day control over financial matters, the authority to determine which creditors would be paid or the authority to sign checks.

Taxpayer did not have the duty to deduct and remit the corporate withholding taxes to the state for the period ending December 1989.

Finding

Taxpayer’s protest is sustained.

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